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No. 92-279

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

GERALD I. MOBLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor's references to petitioner's failure to testify at trial were harmless beyond a reasonable doubt.

2. Whether petitioner was denied a fair trial when an automobile belonging to the husband of the murder victim was returned to its owner before petitioner was afforded an opportunity to inspect it.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction, Pet. App. 1a, is not yet officially reported. The opinion of the Air Force Court of Military Review on remand, Pet. App. 2a-12a, is reported at 34 M.J. 527. An earlier opinion of the Court of Military Appeals, Pet. App. 13a-30a, is reported at 31 M.J. 273. An earlier opinion of the Air Force Court of Military Review, Pet. App. 31a-52a, is reported at 28 M.J. 1024.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 15, 1992. The petition for a writ of

certiorari was filed on August 13, 1992. The Court's jurisdiction is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Bergstrom Air Force Base in Texas, petitioner, a member of the United States Air Force, was convicted on one count of premeditated murder and one count of attempted rape, in violation of Articles 118 and 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 880. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank to the lowest enlisted grade. The convening authority approved the findings and sentence except for the forfeitures, which he reduced to $300 of pay per month for 16 months. The Air Force Court of Military Review initially affirmed the findings, as modified, and the sentence approved by the convening authority. The Court of Military Appeals granted discretionary review, set aside the decision of the Air Force Court of Military Review, and remanded the case to that court to address certain questions regarding the prosecutor's closing argument. On remand, the Air Force Court of Military Review found that some aspects of the prosecutor's closing argument were improper, but held that the improper remarks were harmless beyond a reasonable doubt. On further consideration, the Court of Military Appeals affirmed.

1. a. The victim was the 25-year-old wife of an airman first class. She worked as a cashier at the Noncommissioned Officers' (NCO) Club at Bergstrom Air Force Base. When she did not return home on the night of February 7, 1987, her husband became

concerned and drove to the NCO Club to look for her. He found her lying unconscious and bleeding on the floorboard of the front seat of her car, the apparent victim of a beating, sexual assault, and strangulation. Her body was transported to a hospital, where it was determined that she was "brain dead." Pet. App. 15a, 32a.

The victim had been severely beaten. There was trauma to her head caused by at least four blows from the assailant's fist. The injuries to her neck were caused by use of the car's seat belt strap to strangle her. There were bruises on the victim's legs caused by sustained pressure from the assailant's hands to separate the victim's legs. Tr. 996-1001. The cause of death was asphyxia due to strangulation. Pet. App. 15a, 32a. There was no eyewitness to the crime, but various items of circumstantial evidence proved that petitioner had assaulted and murdered the victim.[1]

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[1] A receipt bearing petitioner's name was found in the front seat of the victim's car. Pet. App. 16a, 32a. Petitioner's permanent duty station was in California, but he had been temporarily assigned to attend the Bergstrom NCO Academy at the time of the murder. *Ibid.* A bloody palm print and fingerprint were found in the vehicle on a piece of paper, and the palm print positively matched a known print of petitioner's. Pet. App. 17a, 33a. A forensic test on saliva taken from petitioner matched semen found on the carpet of the car and on the victim's dress and panties. A pubic hair found in the car matched the unusual pubic hair sample taken from petitioner. Pet. App. 16a, 17a, 32a. Blood on both sides, the sleeves, and the cuffs of a leather jacket seized from petitioner's residence matched the rare blood type of the victim. Pet. App. 16a. An expert testified that the odds of the blood found on the jacket not being the victim's were one in 330. Tr. 954.

b. In the early morning hours of February 7, 1987, Detective Hesskew of the Austin Police Department

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A witness testified that a man matching petitioner's description, wearing a leather jacket, walked in and out of the Bergstrom NCO Club several times on the night of the murder, acting in a manner that frightened the witness. Pet. App. 16a, 32a; Tr. 592-595. A dusty shoe imprint taken from the window of the victim's car matched the sole of one of the shoes petitioner was wearing when he was contacted by the police. Pet. App. 16a, 32a-33a. Petitioner had cashed a number of checks at the NCO Club. On the day of the murder, the victim had cashed one of petitioner's checks. An academy classmate of petitioner's quoted petitioner as saying of the victim that "he wouldn't kick her out of bed for eating crackers and wouldn't mind having a piece of her ass." Tr. 669, 714, 760-763; PX 9.

Petitioner had injured his right thumb playing basketball on January 30, 1987. The thumb was x-rayed and had a splint placed on it at the base hospital. When petitioner was interviewed by investigators, he complained about the thumb, saying he had only limited, painful movement of it. The contusions on the victim's calf, which indicated strong, sustained pressure to keep her legs apart, were caused by someone who used the four fingers of a right hand without also using the thumb. Tr. 751-752, 778, 1000-1001; PX 15, at 45-46.

When he was contacted by investigators, petitioner had several scratch marks on his face and neck. He claimed that he got the scratches playing basketball at the NCO Academy. None of the men with whom petitioner had played ball corroborated his story. Petitioner was at a barbecue at another classmate's home for five hours during the afternoon of the murder, a Saturday. The classmate did not notice any scratches on petitioner at that time. The following Monday morning, the classmate noticed that petitioner had scratches on his face. An expert testified that the scratches on petitioner were consistent with a frontal assault by an individual facing

(APD) and Special Agent Brown of the Air Force Office of Special Investigations (OSI), together with an identification specialist (Koschell) from the APD, returned to review the crime scene after seeing the victim at the hospital. The car door handle was fingerprinted first, so that entry into the vehicle would not destroy potential evidence. Due to the poor lighting in the NCO Club parking lot and heavy condensation that would retard fingerprinting efforts, the car was sealed and transported to a locked garage at the APD station. Pet. App. 33a; Tr. 646-648.

Later that day, APD Detective Hesskew began an examination of the vehicle. First, the car was photographed several times. Detective Hesskew, who was the State of Texas' expert in blood splatter analysis, scrutinized the array of blood and blood splatters throughout the front seat area of the car. Koschell extensively analyzed the interior and exterior of the car for prints. He found prints from the victim, the victim's husband, and others he classified as "unidentified." Hesskew inventoried the interior of the vehicle using rubber gloves and tweezers to remove objects. The car was divided into sections and a special vacuum cleaner was used on each one; the contents were removed and sealed after each section was swept. A special fluorescent light was used to detect any blood, semen, or other evidence of fluids. Hesskew observed and detailed each of the items he found and removed from the car—including semen, hairs, the victim's shoes, her keys and purse, a piece

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him, and were not consistent with petitioner's explanations. Pet. App. 16a; Tr. 781-784, 995-996.

of folded paper, and another piece of paper with a bloody print on it. The front seat belt, which appeared to have blood stains on it, was also cut out and subjected to analysis. Pet. App. 33a-34a; Tr. 652-667; PX 29.

Following the inventory of the car, and on the same day, Detective Hesskew interviewed the victim's husband at the APD. Agent Brown and Detective Hesskew's supervisor were also present. The husband was advised of his rights as a suspect, but based on the results of the interview and other evidence in the case, Detective Hesskew and Agent Brown quickly and independently concluded that he was not a suspect. Pet. App. 34a; Tr. 666-667, 713-714.

Eight to ten days after the murder, and after no major breaks had occurred in the case, Detective Hesskew began to review the evidence in the case. He noted that the folded piece of paper that was retrieved from the front seat of the car appeared not to have been fingerprinted. He took it to Koschell to have it examined. Koschell returned about an hour later with the paper unfolded, showing it to be the receipt with petitioner's name on it. Following a personnel check on petitioner and a review of the cashiers' records at the NCO Club, Detective Hesskew and Agent Brown flew to California to interview petitioner, which they did on February 17, 1987. The investigators noted and photographed the scratches on petitioner; petitioner was interviewed; the shoe and leather jacket were seized; and the blood, saliva and hair samples were taken from petitioner. Thereafter, petitioner's friends and acquaintances from the

NCO Academy were interviewed. Pet. App. 16a, 32a; Tr. 669, 715; PXs 6, 23, 24.

Petitioner was placed in pretrial confinement at Bergstrom on February 24, 1987; he was formally charged the following day. Between February 17 and February 24, petitioner consulted with a Captain Mahone, who had been detailed to represent him. On February 25, lead defense counsel, Captain Nix, was detailed to represent petitioner. Pet. App. 18a, 34a; Tr. 83-88.

On February 25, Detective Hesskew and his supervisors at the APD released the car to its owner, the victim's husband. That action was in accordance with standard operating procedures of the APD. Detective Hesskew called Agent Brown and told him that they were releasing the vehicle. Under APD procedures, the officers were not required to notify anyone other than the owner of the property. The APD had used the same procedure for at least 15 years. Pet. App. 17a, 18a, 34a; Tr. 102-105.

The defense did not learn until mid-March that the car had been released to the victim's husband. No defense counsel had called APD seeking permission to look at the vehicle. The physical evidence taken from the vehicle was available to the defense for inspection. Pet. App. 18a, 34a; Tr. 85-86, 218.

c. During his closing argument, the prosecuting attorney posed various questions to the members of the court-martial panel and then answered the questions based on evidence admitted at trial.[2] The

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[2] The appendix to the Court of Military Appeals' initial opinion contains excerpts of the prosecuting attorney's closing argument. Pet. App. 28a-30a.

defense did not object, and the trial judge did not intervene sua sponte. After the prosecutor had completed his argument, the defense moved for a mistrial, asserting that the prosecuting attorney had called attention to the fact that the petitioner did not testify. Pet. App. 2a. The trial judge viewed the argument as acceptable commentary, but gave a curative instruction to the court-martial panel. The defense did not object to the instruction as given, nor did the defense request any additional instruction. Pet. App. 8a-9a, 24a-25a.

2. The court of military review affirmed. Pet. App. 31a-52a. The court found no prejudicial error in the release of the car to the victim's husband on March 24, 1987. The court noted that the physical evidence actually removed from the vehicle and the forensic tests conducted on that evidence were available for examination by the defense. The court viewed the car as the crime scene itself, and concluded that the authorities were not required to preserve the crime scene until defense representatives could examine it. The court found no evidence of bad faith on the part of the government in releasing the car; the court also noted that any benefit that might have resulted from defense examination of the vehicle while it was in police custody was purely speculative. Pet. App. 31a-36a.

3. The Court of Military Appeals rejected petitioner's argument that the release of the vehicle denied him a fair trial. Pet. App. 17a-22a. The court held that the Constitution does not require the government to preserve a crime scene for examination by defense representatives. Although the court

was critical of the timing of the release of the car, the court noted that the car was not released by military police, but by the Austin city police, and detected no bad faith on the part of the APD officers involved. Pet. App. 20a, 22a. After reviewing the record, the court found no basis to conclude that exculpatory evidence was destroyed because the car was returned to its owner. Pet. App. 21a. The Court of Military Appeals, however, was troubled by the possibility that the prosecutor may have commented on petitioner's silence at trial. The court therefore remanded the case to the court of military review for it to readdress this issue. Pet. App. 27a.

4. On remand, the court of military review found improper certain aspects of the prosecutor's argument. Pet. App. 3a-5a. Nevertheless, the court concluded that any error was harmless beyond a reasonable doubt. Pet. App. 11a.

5. On further review, the Court of Military Appeals summarily affirmed. Pet. App. 1a.

ARGUMENT

1. Petitioner argues that the prosecutor's closing argument was improper since he referred to the fact that petitioner remained silent at trial.[3] The court of

[3] Petitioner also claims that the prosecutor expressed an opinion as to petitioner's guilt and commented on the failure of the defense to present witnesses. Pet. 8-15. The military appellate courts did not expressly address these ancillary claims, but neither one has merit. Petitioner made statements to the investigators that proved to be false. The prosecutor's comments on that fact constituted nothing more than a statement of the government's position in this case and were not phrased as an expression of counsel's personal belief. In

military review agreed with petitioner, concluding that the prosecutor's argument indirectly called attention to defendant's failure to testify at trial. Accordingly, this case does not present that question. The only question that is properly at issue here is the correctness of the ruling of the military appellate courts that the prosecutor's closing argument was harmless beyond a reasonable doubt. Although petitioner challenges the rulings below in that regard, Pet. 6, the fact-bound ruling of the military appellate courts to the contrary does not warrant review by this Court.

A prosecutor's improper comment on a defendant's failure to testify at trial is subject to harmless error analysis. *United States* v. *Hasting*, 461 U.S. 499 (1983). "The primary task of this Court upon review of a harmless-error determination by the court of appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis* v. *Franklin*, 471 U.S. 307, 326 n.10 (1985). Here, the court of military review correctly explained that the inquiry, under *Chapman* v. *California*, 386 U.S. 18 (1967), is whether the error was harmless beyond a reasonable doubt. Pet. App. 9a. In undertaking that inquiry, the court carefully reviewed the record and considered four factors, which are appropriate to a harmless error analysis: (1) whether the prosecutor's argument was manifestly intended as a comment on the defendant's

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addition, although the prosecutor in rebuttal commenced an argument about the defense's failure to call witnesses, the defense objected before he completed those remarks, and the trial judge sustained the objection. Pet. App. 12a-13a; Tr. 1049.

failure to testify, or would naturally and necessarily have been so understood by the court-martial panel; (2) whether the improper comments were isolated or extensive; (3) whether the proof of the defendant's guilt was overwhelming; and (4) whether and when curative instructions were given. Pet. App. 10a, citing *Lent* v. *Wells*, 861 F.2d 972, 975 (6th Cir. 1988), cert. denied, 489 U.S. 1100 (1989).

With regard to the first factor, the court of military review noted, as did the Court of Military Appeals, that appellate judges are at a disadvantage in judging arguments of counsel, because they are not present to observe the attorney's demeanor, tone of voice, voice inflections, pauses, or nuances of his language. Pet. App. 4a, 25a. The reviewing courts found it significant that there was no contemporaneous objection by defense counsel, and the trial judge did not feel the need to intervene sua sponte. Pet. App. 7a, 25a. In denying the defense motion for a mistrial, the trial judge said: "I find that it was evident [that] the pattern of rhetorical questions were just that, rhetorical in nature only, and obviously, under the circumstances, not asked in a manner which invited attention to the fact that the accused did not testify in his own behalf in this trial." Tr. 1035. While it disagreed with the trial judge's characterization of portions of the argument, the court of military review did not find the argument "so egregious as to have required the military judge to interrupt on his own motion." Pet. App. 7a. The court of military review specifically found that the prosecuting attorney "did not deliberately" engage in impermissible argument, and did not find that the prosecutor "manifestly

intended" to comment on petitioner's silence. Pet. App. 10a. That finding is entitled to respect, since the courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c). Similarly, the court did not find that the jury would "naturally and necessarily" construe the argument as a reflection on petitioner's failure to testify. Pet. App. 10a.

Concerning the second factor, the court of military review noted that the rhetorical questions did not "account for a large portion of the total argument presented." Pet. App. 11a. In addition, as the court of military review remarked, the lack of any defense objection "contributed to the extent of improper argument." *Ibid.*

As to the third factor, the Court of Military Appeals and two separate panels of the court of military review characterized the evidence of petitioner's guilt as "overwhelming." Pet. App. 16a, 11a, 43a. Without undertaking an exhaustive review of the evidence, the evidence included: the receipt containing petitioner's name in the front seat of the automobile; the bloody palm/finger print in the vehicle that positively matched petitioner's; the forensic analysis of the seminal fluid and pubic hair found in the vehicle; the comparison of blood samples from the crime scene and petitioner's clothing; the imprint on the car window of the sole of a shoe that matched one worn by petitioner; petitioner's expressed sexual interest in the victim; and the scratches on petitioner's face and neck.

Respecting the final factor, although the trial judge did not find the argument to be in error, he provided a

proper and effective curative instruction in response to the defense motion for a mistrial. He told the jury, Pet. App. 24a n.4 (emphasis omitted).

> The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness in this case. The fact that the accused has not testified on any other matter must be disregarded by you. And, in this regard, you heard the trial counsel during the course of his argument of the evidence, ask certain rhetorical questions which appeared to be directed towards the accused, Sergeant Mobley. I think it was obvious to you that these were [a] rhetorical form of questions and a rhetorical form of argument, but I do caution you again, that the accused has an absolute right to remain silent, and you will not draw any inference adverse to the accused from the fact that he did not testify as a witness.

That instruction, of course, was in addition to the judge's other instructions that the burden of proof was solely upon the government and that the argument of counsel was neither evidence nor a statement of the law for them to follow. Tr. 1055, 1061.

The decision below clearly reflected a carefully considered analysis of the harmless error issue. Moreover, the decision was correct. As the court of military review explained, the proof of petitioner's guilt, although circumstantial, was overwhelming. Pet. App. 11a, 43a. The prosecutor's comments, even if erroneous, could not have prejudiced petitioner.

2. Petitioner argues that he was denied a fair trial by the government's use of evidence obtained from a search of the victim's car. The military courts, however, correctly rejected that claim, and their decisions do not warrant review by this Court.

While defense counsel's motion *in limine* focused on Detective Hesskew's testimony regarding blood splatters, petitioner's written motion to suppress and the petition filed in this Court attempt to include all of the evidence seized or derived from the car. Pet. App. 17a. At the outset, it must be noted that all of the physical evidence and forensic tests were preserved and available to the defense. Pet. App. 21a, 36a. Accordingly, there is no issue in this case whether the government properly disclosed to the defense the evidence it obtained from an examination of the victim's car. Rather, the question is whether the government acted improperly in some way by returning the car to its rightful owner without first allowing petitioner to examine the car, or informing him about its imminent release.

The court of military review correctly characterized the car as the "crime scene" in this case, Pet. App. 35a, and correctly noted as well that there is no constitutional requirement that the government maintain and secure a crime scene for lengthy periods of time while a suspect is captured and his attorney has a chance to examine it, *ibid.* Petitioner's rights were adequately protected by the preservation of the evidence taken from the car, the numerous photographs taken, the availability of the examiners for interview and cross-examination, and even the availability of the vehicle after it was released.

Insofar as the car itself had any evidentiary value, the fact remains, as noted by the court of military review, that "any benefit that might have resulted from a defense examination of the vehicle while it was in police custody is purely speculative." Pet. App. 36a. The trial judge found "no indication whatsoever that any evidence in the car, either inculpatory or exculpatory, material or otherwise, was lost, overlooked, or not removed." Pet. App. 19a n.3. And the Court of Military Appeals' review of the record "suggest[ed] no reasonable theory upon which we could conclude that 'evidence favorable to an accused' was destroyed because the car was returned to the victim's husband." Pet. App. 21a, citing *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The constitutional duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense. The evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and the defendant must be unable to obtain comparable evidence by any other reasonably available means. *Arizona* v. *Youngblood*, 488 U.S. 51 (1988); *California* v. *Trombetta*, 467 U.S. 479 (1984). The failure to preserve potentially useful evidence does not constitute a denial of due process unless the defendant can establish bad faith on the part of the law enforcement authorities. *Arizona* v. *Youngblood*, 488 U.S. at 58. Petitioner cannot make that showing.

In ruling on the motion to suppress at trial, the judge found:

> There is no indication whatsoever that the action of the Austin Police Department in returning the

> auto to its owner after an exhaustive crime scene examination of the interior was motivated by an intention to circumvent disclosure requirements. It was, rather, done in good faith and in accordance with the department's standard practice.

Pet. App. 18a n.3.[4] The court of military review said, "we can find no evidence of bad faith on the part of the Government, including agents of the Office of Special Investigations," who maintained the liaison with the APD. Pet. App. 35a. And the Court of Military Appeals concluded that "[petitioner] has made no showing of 'bad faith.'" Pet. App. 20a (quoting *Arizona* v. *Youngblood*, 488 U.S. at 58). Even defense counsel, who testified on petitioner's motion to suppress, did not believe that either the federal government or the APD tried to conceal evidence. Tr. 88. Defense counsel also acknowledged that the defense had not sought permission to examine the car and that the defense had access to the vehicle after it was released. Tr. 85-86. See *Trombetta*, 467 U.S. at 488; *Killian* v. *United States*, 368 U.S. 231, 242 (1961).

Petitioner attempts to distinguish *Youngblood* from his case, noting that in *Youngblood* the State did not use test results based on evidence that was lost or destroyed before it could be examined by the defense. Pet. 21. That purported distinction lacks

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[4] The Court of Military Appeals emphasized, "the vehicle was returned to the victim's husband by the Austin city police officials, not by the military police. It is doubtful that those officials would be cognizant of the high standards created by Article 46 of the Uniform Code of Military Justice, and we detect no bad faith on their part in releasing the car as they did. *Arizona v. Youngblood, supra.*" Pet. App. 22a.

merit, however, for several reasons. First, the bulk of the evidence in this case proving petitioner's guilt was preserved. Second, this Court held that the evidence not preserved in *Trombetta* was properly used against the defendant in that case. 467 U.S. at 491. Third, since this case did not involve a failure to disclose material, exculpatory evidence in violation of *Brady*, *Youngblood* required petitioner to prove that the APD and OSI acted in "bad faith" in failing to preserve "potentially" useful evidence. 488 U.S. at 58. Petitioner has not made such a showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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